

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

vs.

MOTOROLA, INC., et al.,

Defendants.

MOTOROLA MOBILITY LLC, et al.,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendants.

Case No. C10-1823-JLR

MICROSOFT'S 7/12/13 MOTION TO
SEAL

**NOTED FOR:
Friday, July 26, 2013**

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Exhibit 1 to the Declaration of Christopher Wion in Support of Microsoft's Opposition to Defendants' Motion to Exclude and Strike Testimony of Todd Menenberg ("Wion *Daubert* Declaration"); and

MICROSOFT'S 7/12/13 MOTION TO SEAL - 1
No. C10-1823

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- 1 (2) Exhibit A to the Declaration of David Killough in Support of Microsoft's
2 Opposition to Motorola's Motion for Partial Summary Judgment ("Killough
3 Summary Judgment Declaration").

4 Microsoft seeks to file the foregoing materials under seal because they contain
5 Microsoft's and/or Sidley Austin LLP's confidential business information, which Microsoft
6 has designated as "confidential" under the terms of the protective order issued in this case.

7 Exhibit 1 to the Wion *Daubert* Declaration consists of excerpts from the deposition
8 transcript of Microsoft's damages expert, Todd Menenberg. Microsoft has redacted those
9 limited portions of the excerpts that disclose the increased operating costs Microsoft was
10 forced to incur as a result of relocating to The Netherlands from Germany. Good cause exists
11 to maintain these portions of Mr. Menenberg's deposition transcript under seal. Microsoft is
12 filing a redacted version of Exhibit 1 on the public record.

13 Exhibit A to the Killough Summary Judgment Declaration is a Sidley Austin invoice
14 dated February 28, 2011. This invoice contains information that is not publicly available, such
15 as Sidley's billing rates and time billed. The disclosure of this information could cause
16 commercial harm to Sidley. It also includes the amount Microsoft has paid Sidley in
17 connection with litigating the parties' various actions. This information also is not generally
18 known and its disclosure could harm both Microsoft and Sidley. Compelling reasons exist to
19 maintain Exhibit A under seal at this time.

20 For these reasons, Microsoft respectfully requests permission to file the above-
21 referenced documents under seal and that the Court direct such documents to remain under
22 seal.

23 **II. LCR 5(g)(3)(A) CERTIFICATION**

24 The parties met and conferred on July 12, 2013 in an effort to minimize the amount of
25 material to be filed under seal in connection with this motion. As a result, the parties were able
to reduce the number of documents that they would need to file under seal.

III. FACTS & AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party as Confidential Business Information¹ under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly

¹ “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

1 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 2 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
 3 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 4 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

5 The Court may seal a document filed in support of a non-dispositive motion upon a
 6 showing of good cause. *Kamakana v. City and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th
 7 Cir. 2006). In contrast, a party seeking to seal a judicial record attached to a dispositive motion
 8 must articulate “compelling reasons” that outweigh the public policies favoring disclosure. *Id.*

9 This latter presumption may be overcome by a compelling showing that the public’s
 10 right of access is outweighed by the interests of the public and the parties in protecting the
 11 court’s files from public review. Further, “the public interest in understanding the judicial
 12 system would appear to be less where ... the documents in question are irrelevant to the
 13 Court’s decision.” *Network Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at *2
 14 (N.D. Cal. Mar. 10, 2010) (citing *Kamakana*, 447 F.3d at 1179) (documents supporting
 15 dispositive motion “[not] bearing on the resolution of the dispute on the merits ... are therefore
 16 more akin to the ‘unrelated,’ non-dispositive motion documents the Ninth Circuit contemplated
 17 in *Kamakana*”).

18 “In general, ‘compelling reasons’ ... exist when such ‘court files might have become a
 19 vehicle for improper purposes,’ such as the use of records to ... release trade secrets.”
 20 *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598
 21 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*
 22 *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at *1-2 (W.D. Wash. Mar. 4, 2010)
 23 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade
 24 secret may consist of any formula, pattern, device or compilation of information which is used
 25

1 in one's business, and which gives him an opportunity to obtain an advantage over competitors
2 who do not know or use it." *Id.*, 2010 WL 786021, at *2 (quotations omitted).

3 **B. Good Cause Exists to Permit Microsoft to File Exhibit 1 to the Wion Daubert**
4 **Declaration Under Seal.**

5 Exhibit 1 to the Wion *Daubert* Declaration consists of excerpts from Mr. Menenberg's
6 deposition transcript. Microsoft has redacted only five short statements that disclose the
7 increased operating costs Microsoft was forced to incur as a result of having to relocate from
8 Germany to The Netherlands. These financial figures are not generally known or publicly
9 available, and the companies involved treat them as confidential. Their disclosure publicly
10 could potentially damage Microsoft's relationship with, or future dealings with, other vendors.
11 Microsoft's interest in maintaining the confidential nature of this information outweighs any
12 potential interest the public may have in accessing this information at this stage of the
13 litigation.

14 Further, Microsoft's specific relocation damages figure is not germane to the issues
15 raised by Motorola's motion to exclude Mr. Menenberg's testimony. It is thus unlikely to play
16 any role in the Court's consideration of the merits of Motorola's motion. The public's interest
17 in understanding the judicial system will not be significantly furthered by providing access to
18 this information at this time. For these reasons, good cause exists to maintain Exhibit 1 to the
19 Wion *Daubert* Declaration under seal. A redacted version has been filed on PACER.
20

21 **B. Microsoft and Sidley Have a Compelling Interest in Maintaining the Seal on**
22 **Exhibit A to the Killough Summary Judgment Declaration.**

23 Exhibit A to the Killough Summary Judgment Declaration is a February 28, 2011
24 invoice from Sidley to Microsoft disclosing amounts billed to Microsoft for work performed
25

1 by Sidley in connection with the various disputes pending between Microsoft and Motorola.²
 2 The invoice also discloses Sidley attorneys' billing rates and hours billed in connection with
 3 these matters. This information is not publicly available and is treated as confidential by both
 4 Sidley and Microsoft. There is a significant risk that disclosure of this sensitive information to
 5 Sidley's competitors, clients, and potential clients could cause commercial harm to Sidley.
 6 Further, since Sidley's rates are not germane to Motorola's motion for partial summary
 7 judgment, they are not expected to play a material role in the Court's consideration of that
 8 motion.

9 Exhibit A also discloses fees Microsoft has paid Sidley in connection with the various
 10 suits pending between the parties. This information is also not publicly available, and has
 11 historically been treated as private by both Sidley and Microsoft. While this information will
 12 be relevant at trial, it is not relevant to consideration of the merits of Motorola's partial
 13 summary judgment motion. Disclosure of this information at this point in time will not further
 14 the public's interest in understanding the judicial system. For this reason, it should remain
 15 under seal.
 16

17 **IV. CONCLUSION**

18 For the reasons set forth herein, Microsoft respectfully requests that the Court grant its
 19 motion. A [Proposed] Order Granting Microsoft's 7/12/13 Motion to Seal has been submitted
 20 herewith.
 21
 22
 23

24
 25 ² The redactions that appear in the body of the February 28, 2011 Sidley invoice were made prior to Microsoft's production of the invoice to Motorola in discovery. They were not made in connection with Microsoft's filing the document under seal.

1 DATED this 12th day of July, 2013.

2 **RESPECTFULLY SUBMITTED,**

3
4 **CALFO HARRIGAN LEYH & EAKES LLP**

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CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 12th day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 12th day of July, 2013.

s/ Florine Fujita

FLORINE FUJITA